

ALLEN DOANE, ET AL.

*

NO. 2005-C-0839

VERSUS

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COURT OF APPEAL

DAVID BEARY, M.D., ET AL.

*

FOURTH CIRCUIT

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STATE OF LOUISIANA

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ON APPLICATION FOR WRITS DIRECTED TO
ST. BERNARD 34TH JUDICIAL DISTRICT COURT
NO. 100-826, DIVISION "B"
Honorable Manuel A. Fernandez, Judge

* * * * *

Charles R. Jones
Judge

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(Court composed of Judge Charles R. Jones, Judge Dennis R. Bagneris Sr.,
and Judge Leon A. Cannizzaro Jr.)

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WRIT GRANTED;

REVERSED

The Relator, Chalmette Medical Center, seeks a review of the district court's denial of its Motion for Summary Judgment.

On July 1, 2002, the Respondents, the heirs of Eunice Doane (the Decedent), filed an application for medical review with the Louisiana Patients' Compensation Fund (LCPF) against Dr. David Beary (the surgeon); Registered Nurses Carmen Lombardino and Jackie Blanchard; Shalonda McGowan, an L.P.N.; the Chalmette Medical Center (the hospital) and St. Paul Insurance Company. The Respondents asserted that the Defendants' negligent treatment of the Decedent, caused her death on July 15, 2001.

Prior to her death, the Decedent suffered from rectal bleeding. After several consultations with the Decedent, Dr. Beary performed a colonoscopy on her on July 2, 2001. The following day, the Decedent was determined to have a two-inch perforation of the colon. Dr. Belott immediately performed a laparotomy, sigmoid colectomy and colostomy and Hartman's pouch on Decedent. After this last surgery, the Decedent experienced a slight

improvement before her condition deteriorated, and she subsequently died.

The Medical Review Panel convened on October 23, 2003. All three members concluded the Relator and the nurses met the applicable standard of care. The panel decided, in a two-to-one vote, that the evidence was insufficient to conclude that Dr. Beary failed to meet the standard of care.

The Respondents filed suit on January 16, 2004. In the course of discovery, the Relator forwarded to the Respondents Interrogatories seeking the identity of each expert witness and Requests for Production of Documents seeking any reports pertaining to the allegations.

Based on the Respondents' discovery responses, the Relator filed a Motion for Summary Judgment on August 4, 2004, and it was heard on September 10, 2004. The trial court denied the motion based on the Respondents' representations that the depositions of Dr. John Tu Thien and Dr. Todd P. Belott would support their allegations that the Relator breached the standard of care. Both doctors were deposed. The Relator reasserted its Motion for Summary Judgment and it was heard on April 29, 2005. In a judgment dated May 9, 2005, the court, without reasons, denied the motion. The instant writ application followed.

This Court issued an Order on August 15, 2005, which directed the Respondents to file a response to the instant writ application within ten (10)

days of the date of the Order. Pursuant to this Court's order, the Respondents filed a timely response.

Appellate courts review summary judgment *de novo*, using the same criteria applied by the trial courts to determine whether the summary judgment is appropriate. *Johnson v. State of Louisiana/University Hospital*, 2001-1972, p. 2 (La. App. 4 Cir. 1/16/02), 807 So.2d 367, 369.

La. C.C.P. art. 966(B) provides in part "The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to material fact, and that mover is entitled to judgment as a matter of law."

The moving party has the burden of establishing that there are no genuine issues of material fact. *Williams v. Memorial Medical Center*, 2003-1806, p. 14 (La. App. 4 Cir. 3/17/04), 870 So.2d 1044, 1053, *citing* art. 966(C)(2). If the dispositive issue is one on which the nonmoving party will bear the burden of proof at trial, then the moving party is not required to negate every essential element of the nonmoving party's claim. *Id.* The moving party may satisfy its burden merely by "pointing out" the absence of support for one or more essential elements of the nonmoving party's claim. *Id.*

La. R.S. 9:2794 governs malpractice actions and dictates the plaintiff has the burden of proving:

(1) The degree of knowledge or skill possessed or the degree of care ordinarily exercised by physicians... ; (2) That the defendant either lacked this degree of knowledge or skill or failed to use reasonable care and diligence; and (3) That as a proximate result of this lack of knowledge or skill or the failure to exercise this degree of care the plaintiff suffered injuries that would not otherwise have been incurred.

Expert testimony is not required in a medical malpractice case when there is some obvious act from which a lay person can infer negligence.

Johnson, 2001-1972, p. 5, 807 So.2d at 371. However, in cases that involve complex medical and factual issues, a plaintiff will likely fail to sustain his burden of proving his claim under La. R.S. 9:2794 without medical experts.

Pfiffner v. Correa, 94-0924, p. 9 (La. 10/17/94), 643 So.2d 1228, 1234.

The Relator asserts that the Respondents will not be able to meet their burden of proof by showing that the Relator breached the applicable standard of care and that the breach caused the injuries complained of in the petition. Specifically, the Relator avers that the medical review panel unanimously agreed that the Relator met the applicable standard of care and the opinion of a medical review panel is admissible as expert evidence in a malpractice suit. *Richoux v. Tulane Medical Center*, 617 So.2d 13, 16 (La.

App. 4 Cir. 3/30/93). Furthermore, Drs. Belott and Thien, who the Respondents submitted as expert witnesses, both agreed the evidence did not support the conclusion that the Relator failed to meet the standard of care.

The Respondents argue they have submitted the names of thirteen possible experts who will be used at trial, and the Relator has only deposed two of them. They also aver that because the Relator has not deposed the remaining eleven possible expert witnesses, the Relator has not established a lack of material facts under article 966.

In *Williams*, the defendants submitted the favorable findings of the medical review panel and three affidavits from medical experts in support of their summary judgment motion. The court granted the Respondents several delays to give them the opportunity to either depose or obtain affidavits from expert witnesses to counter the motion. After the Respondents tried and failed to depose or provide affidavits from experts, the trial court granted summary judgment because the Respondents failed to satisfy their evidentiary burden.

In the instant case, the Relator submitted evidence to support its motion in the form of the medical review panel's finding and depositions while pointing out that the Respondents failed to present an expert witness to establish that the Relator did not meet the standard of care. Therefore, the

burden shifted to the Respondents to produce factual support sufficient to establish they will be able to satisfy the evidentiary burden of proof at trial.

The instant case does not involve obvious negligence on the Relator's part, therefore, expert testimony is necessary. The Respondents could have deposed or obtained affidavits from any of their listed experts to counter the Relator's motion. They chose not to do so. Additionally, attached to their response to the instant writ application, the Respondents merely attached copies of both their Medical Review Panel Petition and their Petition for Damages filed in the district court. However, "an adverse party may not rest on the mere allegations or denials of his pleadings." La. C.C.P. art. 967(A).

The Respondents have failed to produce factual support to establish they will be able to satisfy their evidentiary burden of proof at trial as it relates to the Relator. Thus, there is no genuine issue of material fact and summary judgment is appropriate under these circumstances.

For the forgoing reasons, the Relator's request for relief is **GRANTED** and the district court judgment which denied the Relator's Motion for Summary Judgment is hereby **REVERSED**.

**WRIT GRANTED;
REVERSED**